DATE: April 10, 1995

CASE NO.: 94-INA-00030

In the Matter of:

TRES AMIGOS MEXICAN RESTAURANT,
Employer

On Behalf of:

CESAR QUINTANILLA-ORELLANA,
Alien

Appearance: Michael E.K. Mpras, Esq.
For the Employer

Before: Clarke, Huddleston, and Williams
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On November 4, 1992, Tres Amigos Mexican Restaurant ("Employer") filed an application for labor certification to enable Cesar Quintanilla-Orellana ("Alien") to fill the position of Cook, Specialty, Foreign Foods (AF 86). The job duties for the position are "prepares, seasons and cooks soups, meats, vegetables, desserts and other foodstuffs."

The requirements for the position are four years of experience in the job offered or four years of experience as a Kitchen Helper. Other special requirements are good personal references, good hygiene, punctuality and honesty, and willingness to work a varied schedule and any shifts required by the employer.

The CO issued a Notice of Findings on April 14, 1993 (AF 57), proposing to deny certification on the grounds that the requirement of four years of related experience as a Kitchen Helper is unduly restrictive in violation of 20 C.F.R. § 656.21(b)(2), and the Alien did not possess the actual minimum job requirements of four years of experience in the job offered, or four years of experience as a Kitchen Helper in violation of 20 C.F.R. § 656.21(b)(5).

Accordingly, the Employer was notified that it had until November 20, 1992, to rebut the findings or to cure the defects noted.

In its rebuttal, dated April 21, 1993 (AF 17), the Employer contended that the alternative requirement of four years of experience as a Kitchen Helper is less restrictive and expands rather than restricts the universe of potential applicants. The Employer also contended that the position of Kitchen Helper is completely different from that of Cook, Specialty, Foreign Foods, according to the Dictionary of Occupational Titles (DOT), and administrative case law indicates that as long as the Alien obtained his experience from the Employer in a different position, the requirement is allowable without any showing of business necessity.

The CO issued the Final Determination on September 17, 1993 (AF 14), denying certification because the duties of a Kitchen Helper involve cleaning skills, and no evidence or response was provided to show how such knowledge, skills, and abilities bear a reasonable relationship to the position of Cook, Specialty, Foreign Foods, and are essential to perform the

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

job duties as described by the Employer. In addition, the rebuttal did not supply the requested information that: (1) the Alien had the required experience prior to being hired in 1988; (2) due to business necessity, it was less feasible to hire a worker with less than the qualifications presently required; or, (3) to delete the requirements and readvertise.

On September 30, 1993, the Employer requested review of the Denial of Labor Certification (AF 1). On October 19, 1993, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). No brief has been filed by the Employer.

Issues

The issues in this case are whether the Employer's alternative requirements of four years of experience as a Kitchen Helper were unduly restrictive, and whether the Alien possessed the minimum job requirements prior to his being hired.

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* ("DOT"), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

A job opportunity has been described without unduly restrictive requirements where the requirements do not exceed those defined for the job in the DOT and are normally required for a job in the U.S. *Lebanese Arak Corp.*, 87-INA-683 (Apr. 24, 1989) (*en banc*); *Duarte Gallery, Inc.*, 88-INA-92 (Oct. 11, 1989). Hence, prior to an analysis of business necessity, consideration must be given to whether the particular job requirement is normally required or falls within the applicable DOT code. *Tri-P's Corp.*, 87-INA-686 (Feb. 17, 1989) (*en banc*).

The DOT requirements for the position of "Cook, Specialty, Foreign Foods" are:

> Plans menus and cooks foreign-style dishes, dinners, desserts and other foods according to recipes: prepares meats, soups, sauces, vegetables and other foods prior to cooking. Seasons and cooks food according to prescribed method. Portions and garnishes food. Serves food to waiters on order. Estimates food consumption and requisitions or purchases supplies.

(*Dictionary of Occupational Titles*, 313.361-030). The DOT describes the requirement for the position of "Kitchen Helper" as "cleaning and maintenance of the kitchen work area, equipment

and utensils, washes pots pans, and large utensils by hand loads and unloads the dishwasher, and sweeps and mops the floors" (*Dictionary of Occupational Titles,* 318.678-101).

The requirements of the position of "Kitchen Helper" clearly are not part of those required of "Cook, Specialty, Foreign Foods." Here, the CO correctly determined that the Employer must show how its alternative requirement that the employee have four years of experience as a "Kitchen Helper," whose duties involve cleaning and maintenance, bears a reasonable relationship to the position of "Cook, Specialty, Foreign Foods" and is essential to the performance of the duties of that job. Thus, the burden of proof rests with the Employer to establish the business necessity.

We have defined how an employer can show business necessity in *Information Industries, Inc.,* 88-INA-82 (Feb. 9, 1989) (*en banc*). The *Information Industries* standard requires that the employer show that the requirement bears a reasonable relationship to the occupation in the context of the employer's business, and that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer.

The Employer's response in rebuttal is that a series of statements that the alternative requirement is less restrictive, expands the universe of potential applicants, that the DOT allows for four years of experience in a related position, and DOL has certified applicants with the same or similar requirements (AF 18). Essentially, the Employer is arguing that the alternative requirement does not have a "chilling effect" on the number of U.S. workers who may apply for the position, as described in § 656.21(b)(2).

The CO noted that the DOT does allow four years of related experience for the position "Cook, Specialty, Foreign Foods" (AF 16). However, the experience of "Kitchen Helper" involves only cleaning and not cooking and is, therefore, not "related" experience. While allowing experience completely unrelated to cooking may not "chill" the number of U.S. applicants in the traditional sense, it raises concerns whether the Employer is honestly seeking applicants for the position, or is simply tailoring the requirements as a means to hire the Alien without giving serious consideration to U.S. workers. See *Snowbird Development Co.,* 87-INA-546 (Dec. 20, 1988) (*en banc*). Moreover, the Employer's rebuttal does not provide any evidence of business necessity as requested, nor did it readvertise upon deletion of the alternative requirements, or offer to do so.

Therefore, we agree with the CO's determination that the business necessity of the alternative requirement of four years of experience as a "Kitchen Helper" has not been established.

Section 656.21(b)(5) requires that the employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and that the employer has not hired workers with less training or experience for jobs similar, or that it is feasible to hire workers with less training or experience than that required in the employer's job offer. Labor certification is properly denied where the alien does not possess all of the job requirements, thus evidencing that the job was not listed at its actual minimum requirements. *Valley Beth-Shalom School,* 91-INA-382 (Dec. 28, 1992).

Here, the CO requested that the Employer: (1) provide a business necessity showing that the Alien had the experience prior to his being hired in January 1988; (2) submit evidence that it is not presently feasible to hire a worker with less than the qualifications presently required for the job opportunity; or, (3) delete the requirement and readvertise. In its rebuttal, the Employer stated that the CO's position has no support in law or fact, that the Alien gained his experience with the Employer in a "dissimilar position" than that of "Kitchen Helper," and that no showing of business necessity is required. The Employer did not provide requested information from the CO, and did not delete the requirement and readvertise (AF 18).

On his application the Alien appears to have no cooking experience other than that with the Employer since January 1992 (AF 89). His four years of experience as a "Kitchen Helper" were also gained with the Employer from 1988 to 1992 (AF 89). We have already found that the Employer has not established that the position of "Kitchen Helper," which involves cleaning skills, bears a reasonable relationship to the position of "Cook, Specialty, Foreign Foods." The Employer is stating the obvious by claiming the positions are dissimilar. Without some showing of how the Alien's cleaning skills qualify him for a cooking position, how and where the Alien gained his cleaning skills is not relevant.

Moreover, the Employer simply does not address the information requested by the CO. When the Employer fails to respond to the CO's inquiry as to where the Alien had obtained his qualifying experience, certification is properly denied. *Tecnomatix, Inc.*, 90-INA-510 (Jan. 31, 1992). Vague and incomplete rebuttal documentation will not meet the Employer's burden of establishing business necessity. *Analysts International Corporation*, 90-INA-387 (July 30, 1991).

The CO's denial of labor certification was, therefore, entirely proper, and must be affirmed.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of August, 2002, for the Panel:

Richard E. Huddleston
Administrative Law Judge

Judge Joel R. Williams, dissenting:

I agree with the Employer's contentions in regard to both issues raised in the CO's Final Determination.

The Board has held repeatedly that an experience requirement is not unduly restrictive where it is merely an alternative to experience in the job offered and is appropriate to and related

to the job. *Best Luggage, Inc.*, 88-INA-533 (Nov. 1, 1989); *Henry L. Malloy (Mr. & Mrs.)*, 93-INA-355 (Oct. 5, 1994); *Avanti Restaurant & Club*, 93-INA-320. Such a relationship is present in this case. As noted in the Department of Labor's "Occupational Outlook Handbook, 1990-91 Edition," pg. 295-6, kitchen workers may start at one or the other of the less skilled kitchen positions that require little education or training but allow them to acquire food handling skills, and then advance to a position as a cook. According to DOT, a specialty cook (313-361-030) can require up to four years of training. Thus, requiring four years of experience in the alternative position of kitchen helper is not restrictive.

In regard to the Alien's having received his experience while working for the Employer, I note that the Alien had four years of experience with the Employer as a kitchen helper before becoming a cook. It is well established by the Board that experience gained by an alien while working for an employer in a "lesser job" (*i.e.*, one that is "sufficiently dissimilar") does not fall under the proscription of § 656.21(b)(6). *Brent-Wood Products, Inc.*, 88-INA-259 (Feb. 28, 1989) (*en banc*). Clearly, the job of a kitchen helper is "sufficiently dissimilar" from those of a cook under the Board's guidelines. See *Delitzer Corp. of Newton*, 88-INA-482. This is so even considering that the former provided training for the latter. *E&C Precision Fabricating, Inc.*, 89-INA-249 (Nov. 21, 1990), *aff'd en banc* (Feb. 15, 1991).

Accordingly, as I do not agree with the two basis on which the CO denied certification in this case, I would reverse.

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Joel R. Williams
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decisions, or **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002.

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.